Supreme Court, U.S.
FILED
OCT 28 1993
OFFICE OF THE CLERK

No. 93-489

In The

Supreme Court of the United States

October Term, 1993

O'Melveny & Myers, A Law Partnership,
Petitioner,

v.

Federal Deposit Insurance Corporation,
As Receiver for American Diversified Savings Bank,
ADC Financial Corporation, American
Diversified/Wells Park II, and American
Diversified/Gateway Center,
Respondents,

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF MEYER, HENDRICKS, VICTOR, OSBORN & MALEDON, P.A., AS *AMICUS CURIAE* IN SUPPORT OF THE POSITION OF PETITIONER

Andrew D. Hurwitz*
W. Scott Bales
Clark M. Porter
Meyer, Hendricks, Victor, Osborn & Maledon, P.A.
2929 N. Central Ave.,
P.O. Box 33449
Phoenix, AZ 85067-3449
(602) 640-9326

Counsel of record for Amicus Curiae

Pursuant to Rule 37, Rules of the Supreme Court, the Phoenix, Arizona law firm of Meyer, Hendricks, Victor, Osborn & Maledon, P.A. ("MHVOM") files this *amicus curiae* brief in support of Petitioner's Writ of Certiorari in the above-captioned case. The written consents of Petitioner and Respondent to the filing of this brief have been filed with the Clerk.

INTEREST OF *AMICUS CURIAE*

Neither MHVOM nor any of its clients has any direct pecuniary interest in the underlying lawsuit between Respondent and Petitioner. MHVOM's interest in the lawsuit derives from its representation of numerous local law firms and other professional organizations and individuals in lawsuits brought by the FDIC/RTC. MHVOM has read the petition for certiorari and believes that the accompanying memorandum provides an additional perspective on the important issues presented in this case.

ARGUMENT FOR GRANTING THE WRIT

I. *THE NINTH CIRCUIT'S RULING IS CAUSING CONFUSION FOR LITIGANTS AS WELL AS ATTORNEYS WHO CONTINUE TO REPRESENT INSURED INSTITUTIONS*

Over the last five to six years, virtually every major savings and loan in Arizona has failed. The FDIC and RTC have responded by suing many of the most reputable transactional attorneys in Arizona, in most cases alleging that the defendant attorney or law firm should bear full responsibility for failing to prevent the savings and loan client from entering into specific loans or transactions. The enormous costs of defending these professional liability suits, coupled with uncertain standards and the risk of catastrophic damage exposure, have forced defendants to settle these actions, regardless of the merits of the underlying claims.

FDIC v. O'Melveny & Myers, 969 F.2d 744 (9th Cir. 1992) (hereafter *"O'Melveny"*), especially Part IV(B) of the

opinion, has now made a difficult situation worse by threatening to give birth to a new and unwarranted federal duty of investigation and disclosure, purportedly owed by an attorney to the FDIC/RTC.

By suggesting that federal substantive law may effectively prevent imputation to the FDIC/RTC of facts known to and advice received by the institution's officers and directors, the decision below threatens to negate decades of state law decisions protecting attorneys from negligence claims brought by fully informed and advised clients. *See e.g. Fridena v. Evans,* 127 Ariz. 516, 622 P.2d 463 (1980); *Hughes v. The Riggs Bank,* 29 Ariz. 44, 239 P. 297 (1925). *O'Melveny* sweeps away this settled state law in favor of a sketchily defined retroactive duty of care which suggests, for the very first time, that it is not enough for an attorney to provide competent and complete advice to an insured institution's authorized officers.

The FDIC/RTC is already using *O'Melveny* to argue that attorneys for insured institutions effectively owe duties of disclosure and care to the federal regulators themselves. According to the FDIC/RTC's reading of *O'Melveny* it is not enough for an attorney to make frank and full disclosure of legal risks to the controlling officers of the institution. Rather, the FDIC/RTC argues that an attorney can only obtain complete protection from later suit by a federal receiver by reporting directly to the FDIC/RTC whenever the attorney perceives that the insured client is undertaking a potentially risky transaction or exercising business judgment in a manner that the attorney may question.

Thus, *O'Melveny* not only creates confusion in pending professional liability suits, but also adds uncertainty for those attorneys who currently provide routine services to insured institutions. Consider the situation of an Arizona attorney asked by the key officers of an insured institution to document what appears to be a legal but potentially risky loan transaction. Under the well-established law of Arizona and most other states, an attorney may advise her client's agents of the perceived risks, but she has no duty to second guess the business judgment of the client's officers, no duty to stop the client from consummating the loan, and no duty

or right to run to the federal regulators to report the client's intended actions.

O'Melveny obscures the otherwise clear guidance of Arizona law by suggesting that if the insured institution is eventually placed in receivership, the FDIC/RTC may sue the institution's attorney unfettered by any imputation to it of the warnings and advice previously rendered by the attorney. Indeed, the attorney's only sure protection from this sort of suit by the FDIC/RTC – short of abandoning representation of insured institutions altogether – is to file a report with the federal regulators describing the institution's intended transaction and the attorney's reservations. To make matters even more confusing, the same "whistle-blowing" mandated by the FDIC/RTC's interpretation of *O'Melveny* would likely expose the attorney to a malpractice action under Arizona law for breach of confidence.

In short, *O'Melveny* not only conflicts with decisions of other Circuits, but also unjustifiedly displaces established state law schemes of professional regulation upon which attorneys, including those in Arizona, have long relied.

II. *THE NINTH CIRCUIT'S RULING CURRENTLY IMPACTS HUNDREDS OF PENDING LAWSUITS INVOLVING BILLIONS OF DOLLARS IN ALLEGED DAMAGES*

The Court should not wait for other Circuits to address the conflict that has already emerged between the Fifth and Ninth Circuits. The FDIC and RTC currently have hundreds of malpractice suits on file, alleging many billions of dollars in damages, against accounting and legal professionals in states like Arizona and California.

The great majority of these cases involve the assertion of imputation defenses similar to those struck down by the Ninth Circuit on the basis of its newly created federal substantive law. All of these cases will be settled or tried within the next few years under the shadow of *O'Melveny* unless it is overturned or clarified.

CONCLUSION

Traditionally, the licensing and regulating of the conduct and duties of attorneys have been left to the States. The Ninth Circuit, without support or precedent, has unwisely jettisoned a large body of law and regulation in favor of a newly announced federal duty designed solely to enhance the ability of the FDIC/RTC to sue insured third party professional defendants. *O'Melveny* thus raises issues that go to the heart of federalism. If the decision stands it will create enormous confusion not only in pending FDIC/RTC litigation suits against attorneys and their law firms, but also for those law firms currently representing financial institutions. The petition for a writ of certiorari should be granted.

Respectfully submitted this 28th day of October, 1993.

MEYER, HENDRICKS, VICTOR, OSBORN & MALEDON, A Professional Association

Andrew D. Hurwitz, Esq.*
W. Scott Bales
Clark M. Porter
2929 North Central Avenue
P.O. Box 33449
Phoenix, AZ 85067-3449
(602) 640-9326

Counsel of record for Amicus Curiae